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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	5
Conclusion	8

CITATIONS

Cases:	
Barta v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553, certiorari denied, 358 U.S. 932	6
Davis v. *Beason*, 133 U.S. 333	8
Native American Church v. *Navajo Tribal Council*, 272 F. 2d 131	6, 7
Poe v. *Ullman*, 367 U.S. 497	5
Reynolds v. *United States*, 98 U.S. 145	8
Spielman Motor Sales Co. v. *Dodge*, 295 U.S. 89	5
State v. *Big Sheep*, 75 Mont. 219, 243 Pac. 1067	8
Talton v. *Mayes*, 163 U.S. 376	6
Toledo v. *Pueblo De Jemez*, 119 F. Supp. 429	6
Williams v. *Lee*, 358 U.S. 217	3
Constitutional Provisions, Statutes and Regulations:	
First Amendment	2, 4, 6, 7, 8
18 U.S.C. 1153	3
42 U.S.C. 201(j)	2
Arizona Rev. Stat., Sec. 36–1061	3
California Health and Safety Code, Sec. 11001	3
Colorado Rev. Stat. (1953), Secs. 48–5–1 *et seq*	3
Rev. Code of Montana (1947), Sec. 94–35–123	3
25 CFR 11.87 NH (formerly 25 CFR, 1941 Supp., Sec. 161.87 NH)	3

672379—63

Miscellaneous:

	Page
Cohen, Felix S., *Handbook of Federal Indian Law*, (1940), p. 123, revised in Department of the Interior, *Federal Indian Law* (1958), p. 398	6
3 Moore, *Federal Practice* (1948)	7
Navajo Tribal Resolution No. CJ-1-40	3
Navajo Tribal Resolution No. CJA-1-59	3

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 621

JAMES OLIVER, ET AL., PETITIONERS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 306 F. 2d 819 and is set out in the Appendix to the petition. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1962. The time within which to file a petition for a writ of certiorari was extended by Chief Justice Warren to November 30, 1962. The petition for a writ of certiorari was filed November 28, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does an action against the Secretary of the Interior challenging his "approval" of an ordinance of the Navajo Tribal Council banning the use of "peyote" on the Navajo Reservation present a justiciable case or controversy where responsibility for the enforcement of the ordinance is vested in the police and courts of the Navajo Tribe, not in the Secretary?

STATEMENT

Petitioners seek a declaratory judgment that action taken by the Secretary of the Interior in approving a Navajo tribal resolution banning the use of "peyote" on the reservation was null and void and in violation of the First Amendment to the Constitution of the United States.

Petitioners are members of the Navajo Tribe and of the Native American Church, a religious organization with members and adherents among Indians of many tribes in the United States and Canada (J.A. 4–5, 24).[1] They allege that a substance known as "peyote," consisting of the tops of a small cactus, is used by them for sacramental purposes; is indispensable to the prayers, rites, and ceremonies of their religion (J.A. 4–5); and is neither deleterious nor habit-forming. Although the Secretary, in his answer, took no position as to the harmfulness of "peyote," he did point out that Congress has included this substance within its definition of a "habit-forming narcotic drug," 42 U.S.C. 201(j) (J.A. 19). Four states—

[1] References are to the Joint Appendix to Brief for Appellants printed for use of the court below.

Arizona, California, Colorado, and Montana—have statutes prohibiting the use or possession of peyote.[2]

In 1940, the Law and Order Code of the Department of the Interior (hereinafter called the "departmental Code") was applicable to the Navajo Reservation,[3] the Navajo Tribe having no such code of its own. By Resolution No. CJ–1–40 of June 3, 1940, the Tribal Council requested the Secretary of the Interior to include in the departmental Code a provision outlawing the introduction and use of peyote on the Navajo Reservation. On December 18, 1940, the Acting Secretary of the Interior, upon the recommendation of the Commissioner of Indian Affairs, approved the resolution, and added to the Code a section prohibiting Indians from introducing peyote into, or using it within, the Navajo country. 25 CFR 11.87 NH (formerly 25 CFR, 1941 Supplement, Sec. 161.87 NH).

The departmental regulation remained in force until February 11, 1959. On that date, acting under authority delegated to him by the Secretary of the Interior, the Commissioner of Indian Affairs approved Navajo Resolution No. CJA–1–59, which had been enacted by the Tribal Council on January 6, 1959. By this resolution the Navajo Tribal Council adopted the entire departmental Code (including 25 CFR 11.87 NH) as tribal law. Thereupon, as the Secretary alleged, the departmental peyote regulation

[2] Arizona Rev. Stat. (1956), Sec. 36–1061; California Health and Safety Code (1955), Sec. 11001; Colorado Rev. Stat. (1953), Secs. 48–5–1 *et seq.*, Rev. Code of Montana (1947), Sec. 94–35–123.

[3] Ten major crimes had been made federal offenses. 18 U.S.C. 1153. State law does not apply. *Williams* v. *Lee*, 358 U.S. 217.

ceased to be applicable to the Navajo Reservation (J.A. 19–20, 28).

The Secretary denied that he had threatened to enforce the peyote prohibition on the Navajo Reservation and asserted that he had no intention of doing so (J.A. 21, 28). He further alleged that since the adoption of the departmental Code by the Navajo Tribal Council there had been no regulation of the Department of the Interior prohibiting the use of peyote by Indians on the Navajo Indian Reservation (J.A. 28, 30). On these facts the district court, without writing an opinion, denied the plaintiff's motion for summary judgment, granted that of the defendant, and dismissed the complaint (J.A. 31). The Court of Appeals for the District of Columbia affirmed the dismissal.

In their complaint, petitioners requested a declaration that the action of respondent's predecessor in approving the tribe's 1940 resolution and the failure of respondent himself to rescind that approval were violations of the First Amendment. The court of appeals, in affirming the dismissal, concluded that petitioners had failed to show the existence of a present case or controversy with respect to the 1940 action, since that action had been superseded in 1959 by the adoption of the tribal ordinance banning peyote (Pet. 3a). However, since petitioners had also requested such "other and further relief" as might be deemed proper, the court proceeded to consider the 1959 action as well, declaring (Pet. App. 6a–7a) that "the Secretary's approval of the tribal action in 1959 was entirely in keeping with that abstinence from federal

intervention in the internal affairs of an Indian tribe which the law clearly requires" and had "simply recognized the valid governing authority of the Tribal Council." Moreover, the court emphasized that the Secretary had disclaimed any intention of enforcing the peyote ordinance, and concluded that "appellants have failed to present more than an abstract question * * *."

ARGUMENT

1. This suit for declaratory relief is before the wrong court and against the wrong party. There is no justiciable controversy between petitioners and the Secretary of the Interior. The Secretary has stated categorically that he has no intention to arrest or prosecute petitioners for the use of peyote. Indeed, such action would not lie within his province, since the enforcement of the Navajo Law and Order Code, including the peyote ordinance, is the responsibility, not of the Secretary, but of the tribe itself. True, the Secretary's act of approval in 1959 was a prerequisite to the effective adoption of the ordinance. What gives rise, however, to a justiciable controversy warranting declaratory relief is not the mere existence of an ordinance on the books—much less the bare act of executive or supervisory approval which may have consummated its enactment—but rather the direct and immediate threat that the ordinance will be brought to bear upon the individual complainant by the officials charged with its enforcement. *Poe* v. *Ullman*, 367 U.S. 497. Cf. *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89. It is the action of these officials which the threatened individual seeks to forestall, and it is therefore against them, not the

"legislators," that he must pursue his remedy. Thus, in the present case, petitioners' proper course was to challenge the peyote ordinance in a suit against the appropriate law enforcement officers of the Navajo Tribe. In such an action, they would have been free to contend that the tribal ordinance is ineffective because the Secretary's approval, upon which it depended, was a nullity.

We recognize that there may be impediments to an action against the tribal officers. In *Native American Church* v. *Navajo Tribal Council*, 272 F. 2d 131 (C.A. 10), a class action brought by the Native American Church and some of its members (other than petitioners here) to enjoin the Navajo tribal authorities, on First Amendment grounds, from enforcing the peyote prohibition, the Tenth Circuit affirmed the district court's dismissal of the complaint on the following grounds: (a) that federal courts are without jurisdiction over matters involving purely penal ordinances passed by the Navajo legislative body to regulate life on the reservation; and (b) that the limitations imposed upon Congress by the First Amendment do not apply to legislative action of an Indian tribe. See *Talton* v. *Mayes*, 163 U.S. 376; *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (C.A. 8), certiorari denied, 358 U.S. 932; *Toledo* v. *Pueblo De Jemez*, 119 F. Supp. 429 (D.C. N.M.); Felix S. Cohen, *Handbook of Federal Indian Law* (1940), page 123 (revised in Department of the Interior, *Federal Indian Law* (1958), page 398). The merits of that decision, however, are not free from doubt, and it may well be that this Court would uphold the

jurisdiction of the federal courts over such an action.[4] If, on the other hand, the Tenth Circuit was correct in disclaiming jurisdiction, a similar disclaimer would be required here also, since the Secretary's 1959 action was merely a step in the process by which the same tribal ordinance became effective, and since the only practical consequence of a decision for the petitioners would be to render that ordinance unenforceable. The point we emphasize is that if federal courts have any jurisdiction of the subject matter of an action challenging the validity of a tribal ordinance, such jurisdiction may be exercised only in a case in which the true adversaries, *i.e.*, the tribal officials who threaten enforcement, are before the court.

2. Even if the Court grants this petition, it will not be required to reach the "ultimate" constitutional issue, *i.e.*, whether the prohibition against the use of peyote, assuming it to be the product of federal action, amounts to a violation of the First Amendment. Since the district court disposed of the case on summary judgment, and probably on the same grounds adduced by the court of appeals, the record is substantially lacking in evidence or findings as to the

[4] We assume that petitioners would not be bound by the adverse decision rendered against their church and co-religionists in the *Native American Church* case. That action was, in Professor Moore's familiar classification, a "spurious" class action, so that, in his view at least, the judgment entered therein would not be binding upon absent members of the class even if they had full notice of the suit. 3 Moore, *Federal Practice* (1948) 3442-3445, 3465-3468. However, in determining whether the instant case presents a justiciable controversy, it is, of course, immaterial that an action against the tribal officials might be barred by *res judicata*.

nature of peyote and the degree of its harmfulness. We suggest, however, that petitioners' First Amendment claim is, on its face, extremely tenuous. In the Mormon polygamy cases, *Reynolds* v. *United States*, 98 U.S. 145, 166–167, and *Davis* v. *Beason*, 133 U.S. 333, 342–343, 345, this Court made it clear that practices (as distinct from religious beliefs) which endanger the health or welfare of the community as a whole may validly be prohibited even though such practices may be required by a particular religion. As we have pointed out, *supra*, at pp. 2–3, four states have prohibited the use of peyote as a dangerous drug, and Congress has characterized it as a "habit-forming narcotic drug." See also *State* v. *Big Sheep*, 75 Mont. 219, 238–240, 243 Pac. 1067, 1073, in which the Montana Supreme Court held that the Montana statute banning the use of peyote did not infringe the First Amendment rights of an Indian member of the Native American Church, since "[i]t was clearly within the power of the legislature to determine whether the practice of using peyote is inconsistent with the good order, peace and safety of the state."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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